

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

LEE MEYERS,

Respondent.

**Docket No. FMCSA-2007-28287¹
(Western Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. *Background*

On March 7, 2007, the Federal Motor Carrier Safety Administration (FMCSA) Montana Division Administrator served a Notice of Claim (NOC) on Lee Meyers (Respondent). The NOC, based on a February 14, 2007, compliance review, charged Respondent with three violations of the Federal Motor Carrier Safety Regulations: (1) one violation of 49 CFR 387.7(a), operating a motor vehicle without the required minimum level of financial responsibility coverage in effect; (2) one violation of 49 CFR 391.51(a), failing to maintain a driver qualification file on each driver employed; and (3) one violation of 49 CFR 395.8(a), failing to require a driver to make a record of duty status. The NOC proposed a civil penalty of \$2,050 for the violations.²

After Respondent failed to respond to the NOC, the Field Administrator for FMCSA's Western Service Center (Claimant) served a Notice of Default and Final

¹ The prior case number was MT-2007-0028-US1166.

² Exhibit A to Claimant's Response to Petition for Reconsideration.

Agency Order (NFAO) on April 12, 2007.³ The NFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective April 18, 2007, with the civil penalty immediately due and payable on that date.

On April 21, 2007, Respondent mailed a letter to Claimant styled Petition for Reconsideration that stated, in its entirety: "I sold the truck in March of 2006. At that time I discontinued (stopped) keeping records & filings on the truck. Enclosed is a copy of this year's Truck Registration as proof that I do not own the truck."⁴ The letter attached a copy of a Montana Vehicle Registration and Payment Receipt dated February 12, 2007, showing a 1997 Volvo registered to Dorothy D. Azure, care of D and L Livestock, of Arlee, Montana.

In his Response to the Petition for Reconsideration dated May 18, 2007, Claimant requested that the petition be denied because Respondent's claim to have sold his vehicle in March 2006 is rebutted by evidence showing that Respondent operated the vehicle several months after he claimed to have sold it.

2. Decision

Respondent defaulted because he did not file a response within 30 days of service of the NOC, as required by 49 CFR 386.14. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed

³ Exhibit B to Claimant's Response to Petition for Reconsideration.

⁴ This letter was not served on the Assistant Administrator in accordance with 49 CFR 386.7 and was submitted for the record as Exhibit C to Claimant's Response to Petition for Reconsideration

Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has failed to meet his burden of demonstrating that the Final Agency Order should be vacated. The Petition does not address the question of why Respondent failed to reply to the NOC despite having ample opportunity to do so. Consequently, there is no basis for concluding his neglect was excusable. Respondent's defense, that he had sold his truck and was no longer operating on August 15, 2006, the date of the violations alleged in the NOC, is not supported by the evidence attached to his petition, which only shows that the vehicle in question, a 1997 Volvo, was registered in someone else's name on February 12, 2007.

On the other hand, Claimant submitted: (1) a Montana Department of Transportation Driver Vehicle Examination Report establishing that Respondent was transporting livestock in this vehicle from Davenport, Washington to Moises, Montana on August 15, 2006; (2) an oral interview report with a livestock shipper stating he hired Respondent to transport this shipment; and (3) a copy of an Idaho Temporary Registration Permit issued to Respondent on August 15, 2006, indicating he was operating the 1997 Volvo at that time.⁵ Therefore, Respondent has not presented a meritorious defense to the charges.

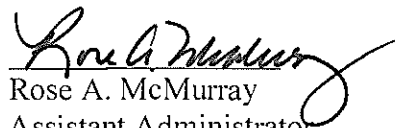
Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing his Petition for Reconsideration within a few days after receiving the NDFAO, it would be an empty

⁵ Exhibit D to Claimant's Response to Petition for Reconsideration.

exercise or futile gesture to vacate the Final Agency Order if he is unable to demonstrate a meritorious defense.⁶

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.⁷

It Is So Ordered.


Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4-23-09
Date

⁶ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), at 5.

⁷ The April 12, 2007, NDFAO stated that the \$2,050 civil penalty was due and payable on April 18, 2007, the date that the NOC would become the Final Agency Order. Because Respondent did not petition for reconsideration until after April 18, 2007, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of April, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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